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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

JAMES VARGA, Plaintiff, v. TWITCH INTERACTIVE, INC. a/k/a TWITCH.TV, INC. Defendant.	Case No. CGC-18-564337 **PLAINTIFF'S OPENING TRIAL BRIEF FOR BIFURCATED TRIAL** Date: March 8, 2019 Time: 2:00 p.m. Dept.: 304
TWITCH INTERACTIVE, INC. a/k/a TWITCH.TV, INC., Cross-Complainant, v. JAMES VARGA, Cross-Defendant.	Complaint Filed: February 14, 2018 Cross-Complaint Filed: May 2, 2018 Am. Cross-Complaint Filed: Oct. 10, 2018 Second Am. Cross-Complaint Filed: January 7, 2019 Trial Date: August 13-14, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Plaintiff / Cross-Defendant, James Varga ("Varga") respectfully states as follows as his Opening Trial Brief.

INTRODUCTION

In November 2012, Varga was young, inexperienced, and struggling to make a career in the still nascent livestreaming industry. Twitch Interactive, Inc. ("Twitch") was, by contrast, a sophisticated company on the rise, backed by venture capital investors and outside counsel. Twitch used its advantages over Varga to incorporate one-sided provisions favorable to itself into a Content License and Base Network Agreement that the parties ultimately signed in 2012 (the "Agreement") and the Amendment to the Content License and Base Network Agreement that the parties signed in 2014 (the "Amended Agreement" and, collectively with the Agreement, the "Agreements"). In particular, unbeknownst to Varga, Twitch, on page ten of seventeen in the Agreement, Twitch had buried a provision a provision entitled "Limitation of Liability" (the "Limiation of Liability Provision") which, while purportedly serving to limit the liability of both parties equally, in fact served to almost totally deprive Varga of any remedies he may have had against Twitch while leaving Twitch's potential remedies against Varga essentially unaffected.

Four years later, Twitch improperly suspended Varga's account, breaching the Agreements, committing intentional and negligent misrepresentation, and violating the prohibition on unfair business practices set forth in Section 17200, et seq of the Business and Professions Code. After Varga filed the present lawsuit seeking the damages that resulted from Twitch's improper actions, Twitch filed its answer asserting that the damages sought by Varga exceed those permitted by the Limitation of Liability Provision. If Twitch's argument is successful, Varga will be barred from recovering all but a fraction of the damages he has suffered as a result of Twitch's actions.

Recognizing the importance of this issue, the Court has set a trial for August 13 and 14, 2019 to determine whether the Limitation of Liability Provision is unenforceable and requested the present Opening Trial Brief prior to the trial. As is set forth below, the evidence that Varga will present at this trial, as well as the terms of the Agreements themselves, demonstrates that Limitation of Liability Provision is unenforceable for at least three reasons. **First**, the provisions

of the Limitation of Liability Provision are Unconscionable. **Second**, the application of the Limitation of Liability Provision to the claims in Varga's Complaint would be against public policy. **Finally**, the Limitation of Liability Provision contains an unreasonable liquidated damages provision. Although the evidence that will be presented at trial will demonstrate that the Court can and should declare the Limitation of Liability Provision unenforceable for each of these three reasons, the presence of even one of these conditions is sufficient grounds for the Court to declare the provision unenforceable. After the conclusion of the trial, the Court should, therefore declare that the Limitation of Liability Provision is unenforceable as against Varga.

FACTUAL BACKGROUND

The Agreement was signed in November 2012. At that time, Varga was a 22 years old, attending college part time, and living at home with his parents. His professional experience was limited to working at the electronics retailer Best Buy and he had no legal experience whatsoever, never having had reason to hire a lawyer. At that time, Varga was also performing live broadcasting of video game related content, or "livestreaming," on a website called Own3d. Own3d was at this time struggling financially and having difficulty paying its content providers, including Varga. (Pl. Ex. 1, Howell Tr., 53:23-54:2, 145:7-13.) In particular, Own3d owed Varga $7,990.30 for streaming he had performed, an amount which caused Varga significant financial distress and meant he was having difficulty paying his college tuition. (Pl. Ex. 2, Varga Tr., 76:23-74:3.) Varga was also aware based on statements in social media, that other top content providers were unhappy at Own3d and were considering leaving. (Pl. Ex. 2, Varga Tr., 105:20-25.)

During this same period, Twitch was Own3d's only competitor in the market for livestreaming, but its trajectory was heading in a completely different direction. (Pl. Ex. 2, Varga Tr., 78:11-14.) By 2012, Twitch had already signed 300-500 "Partnership Agreements" with content providers such as Varga and its business was expanding significantly. (Pl. Ex. 1, Howell Tr. 33:10-16; 48:3-17.) Twitch was backed by sophisticated investors, receiving its initial funding through Y Combinator and subsequent rounds of investment through the venture capital firms Alsop Louie Partners and Bessemet Venture Partners. (Pl. Ex. 1, Howell Tr., 158:10-19.) Twitch was also supported by the large law firm Wilson Sonsini Goodrich & Rosati as their outside

counsel. (Pl. Ex. 1, Howell Tr., 64:12-24.) At this time, Twitch was seeking to expand its role in the streaming market and, as part of this effort, sent out multiple teams of recruiters to target content providers from Own3d and other places. (Pl. Ex. 1, Howell Tr., 34:21-35:4, 35:25-5)

As part of these recruitment efforts, on November 14, 2012 Twitch had two former Own3d employees, Jason "Opie Babo" ("Babo") and Stuart Saw ("Saw") contact Varga. During the entire time he was streaming at Own3d, Varga's main point of contact with Own3d was Babo, who served as what Own3d called Varga's "manager" at the company. Varga communicated regularly with Babo, whom he trusted and respected based on their experiences together. (Pl. Ex. 2, Varga Tr. 70:4-16.) Indeed, based on their interactions together, Varga believed that he had a close relationship with Babo and that Babo would take care of Varga and hold his best interests at heart. (Pl. Ex. 2, Varga Tr. 75:8-10.) Saw had been Babo's supervisor at Own3d and, at the time he contacted Varga, was leading the recruitment of five to ten other Own3d content providers to work for Twitch. (Pl. Ex. 1, Howell 63:3-20.) At some point on or prior to November 2012, Twitch had hired Babo and Saw to serve as recruiters to bring content providers to Twitch. (Pl. Ex. 1, Howell Tr., 60:3-11.) At the time of the November 14, 2012 call, however, Varga was unaware of this and believed that Babo and Saw were, like Varga, still employed by Own3d. (Pl. Ex. 2, Varga Tr., 75:2-13.) Babo and Saw appear to have attempted to perpetuate this mistaken belief, telling Varga that they were then only *planning* to leave Own3d to join Twitch. (Pl. Ex. 50, VARGA00211.)

As part of their pitch to Varga, Babo and Saw set out a number of positives aspects of the deal Varga would receive from Twitch. In particular, Babo and Saw told Varga that Twitch would offer Varga more: (1) stable infrastructure than Own3d; (2) exposure on its front web page (an offer that turned out to be untrue); and (3) pay than Own3d. (Pl. Ex. 50, VARGA00211.) Babo and Saw also told Varga that Twitch would pay the $7,990.30 that he was still owed by Own3d and was causing him financial distress. (*Id.*) Babo and Saw did not indicate that any of these terms were open for negotiation and, based on their tenor, Varga believed it to be a "take it or leave" offer from Twitch. (Pl. Ex. 2, Varga Tr., 74:15-23.) Nor did Babo or Saw mention the Limitation of Liability Provision or any other provisions of the Agreement other than what Varga would be

paid. (*See* Pl. Ex. 50, VARGA00211.) Babo and Saw, did however, instruct Varga to get in contact with John Howell, another employee of Twitch, and request that this $7,990.30 payment be added to the contract he signed with Twitch as part of a follow up conversation. (Pl. Ex. 2, Varga Tr., 118:24-25:10.) Babo and Saw also made clear that Varga needed to act fast because Own3d was falling apart and a number of other prominent content providers were moving to Twitch along with Babo and Saw. (Pl. Ex. 2, Varga Tr., 75:2-13; 77:11-22; Pl. Ex. 50, VARGA00211.) Babo also told Varga something along the lines of that Varga needed to close "right away" or "as soon as possible." (Pl. Ex. 2, Varga Tr., 90:11-15.)

After his conversation with Saw and Babo, the only other person with whom Varga discussed the possibility of moving to Twitch was his brother Nick Varga, to whom he sent an email after the call with Saw and Opie summarizing what they had said. (Pl. Ex. 50, VARGA00211.) Nick Varga's only response during a subsequent conversation with Varga was that the offer "looks cool." (Pl. Ex. 2, Varga Tr., 101:11-15.)

After the call with Varga, on November 14, 2014, Saw called and sent an email to Babo's supervisor at Twitch, John Howell ("Howell"), stating that Varga and several other Own3d employees whom Saw had been recruiting at the same time were "ready to go." (Pl. Ex. 41, TII_VARGA_00000479.) Howell interpreted this to mean that Varga was ready to sign with Twitch and instructed Twitch's outside counsel to draft the Agreement, which had not been prepared prior to the phone call with Varga. (Pl. Ex. 1, Howell Tr., 63:3-11.) Also on November 14, 2012, Howell sent Varga an email saying he was "Super excited to have you on board!" and requesting that Varga create an account with Twitch and send Howell certain contact information. (Pl. Ex. 2, TII_VARGA_00000697.) Varga responded later that day with the contact information and Howell responded by telling Varga that Twitch was "in the process of creating your partner agreement" and that it would be sent to Varga "asap." (*Id.*)

On November 17, 2019, at approximately 7:30 p.m. pacific time, Varga and Howell held a text conversation via Skype messenger, during which Varga stated that he was ready to join Twitch. (Pl. Ex. 49, VARGA00035.) As Babo and Saw had instructed him to do, Varga raised to Howell the possibility of being paid the $7,990.30 he was owed from his time at Own3d, to which

Howell responded "That's doable." (Pl. Ex. 49, VARGA00035; Pl. Ex. 2, Varga Tr., 113:5-14.) During this conversation, other than raising this payment, Varga did not attempt to negotiate any terms of the Agreement because he understood based on his conversation with Babo and Saw that: (a) the offer was take it or leave and thus non-negotiable; and (2) there was a sense of urgency to getting it signed. (Pl. Ex. 2, Varga Tr., 102:15-23.) Like Babo and Saw, Howell did not raise the Limitation of Liability Provision or any other provisions of the Agreement other than the $7,990.30. Nor did Howell urge Varga to discuss the terms of the Agreement with an attorney before signing, or offer Varga time to retain an attorney to review and negotiate the Agreement on his behalf. Indeed, Varga had not even been presented with the Agreement at this time.

Roughly an hour after this conversation with Howell, at 8:35 PM Pacific Time, Twitch sent the Agreement to Varga via the Hello Sign electronic contract program. (Pl. Ex. 35, TII_VARGA_00000658.) Thirty minutes later, at 9:08 PM Pacific Time, Varga signed the document electronically using Hello Sign. (Pl. Ex. 35, TII_VARGA_00000658.) Howell signed the Agreement on Twitch's behalf a month later on December 11, 2012. (Pl. Ex. 26, Twitch's Second Am. Interrogatory Responses, p. 9.) Because he trusted Babo and Saw, Varga did not review the Agreement before signing it. (Pl. Ex. 2, Varga Tr., 124:6-14.) Nor did he speak with an attorney or anyone else regarding the Agreement. Instead, after receiving the Agreement, Varga simply hit the "Next" button in the Hello Sign system/program which transported him directly to the signature page of the Agreement, which he then signed that page electronically. (Pl. Ex. 2, Varga Tr. 124:23-125:8.) Nothing in the Hello Sign system/program required Varga to initial the Limitation of Liability Provision or otherwise ensure that he had reviewed it or any other provision of the Agreement. For example, the Hello Sign system/program did not require him to scroll through the entirety of the Agreement before signing it, nor did it have a mechanism that confirmed or made sure he read the entirety of the Agreement before signing.

The Agreement was one of hundreds of similar documents prepared by Twitch for content providers around this time. The Agreement was based on a generic boilerplate contract to be used for content providers, which had been prepared and maintained by Twitch's outside legal counsel. (Pl. Ex. 1, Howell Tr., 71:13-20; 76:22-77:4 Pl. Ex. 32, TII_VARGA_00000772-779.) The only

changes made from this boilerplate contract for the Agreement with Varga were the higher than average revenue Babo and Saw had offered Varga and the $7,990.30 one-time payment. (Pl. Ex. 26, Twitch's Second Am. Response to Varga's Special Interrogatories, Response No. 86.) Other than those changes, and the inclusion of Varga's contact information, the Agreement was identical to the boilerplate contract prepared by Twitch's outside counsel.

The Agreement that Varga signed is seventeen pages long, including six pages of exhibits at its end. (Pl. Ex. 34, TII_VARGA_00000640-657.) The signature page, which is the only page that Varga actually viewed prior to signing the Agreement, is on page three of the Agreement, the first substantive page of the Agreement, and lists the effective date of the Agreement, the term of the Agreement, and the length of the Agreement. (Pl. Ex. 34, TII_VARGA_00000642.) The signature page also states that the "Licensed Content" involved in the Agreement could be found in Exhibit A of the Agreement and the "Fee Schedule" of the Agreement could be found in Exhibit B. (*Ibid*.) Other than these items, the signature page does not contain or reference any substantive provisions of the Agreement, incuding (without limitation) the Limitation of Liability Provision.

The terms by which Varga was to be paid by Twitch were set forth in Exhibit B to the Agreement. Essentially, Varga was to be paid a share of the revenue Twitch received from two sources: "Gross Advertising Revenues" and "Gross Subscription Revenues." (Pl. Ex. 34, TII_VARGA_00000640-657.) Exhibit B defined "Gross Advertising Revenues" as "revenues actually received by Twitch.tv for the display or broadcast of any Advertising in connection with the Licensed Content . . . less any chargebacks or fraudulent transactions which require a refund of revenues previously received." (*Ibid.*) Varga's share of the Gross Advertising Revenues received by Twitch would amount to "$5.00 per 1000 delivered ad impressions shown against Content Provider's Content." (*Ibid.*) Exhibit B defined "Gross Subscription Revenues" as the "total revenues actually received by Twitch.tv from viewers and end users who have purchased Subscription Services, less any chargebacks or fraudulent transactions which require a refund of revenues previously received." (*Ibid.*) These Gross Subscription Revenues would be "split 70%/30% between the Parties." (*Ibid.*) Additionally, Exhibit B stated that Varga would be paid

the $7,990.39 he was owed from his time at Own3d within 30 days of the execution of the Agreement. (*Ibid.*)

The Limitation of Liability Provision is set forth in Section 8.4 of the Agreement, which is located on page ten of the Agreement. (Pl. Ex. 34, TII_VARGA_00000649.) The Limitation of Liability Provision states, in full:

> **8.4** Limitation of Liability. EXCEPT FOR A PARTY'S OBLIGATIONS UNDER THIS SECTION (INDEMNITY), OR A BREACH BY A PARTY OF ITS OBLIGATIONS UNDER SECTION 6 (CONFIDENTIALITY), NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY: (a) FOR LOST REVENUE, LOST PROFITS, LOST BUSINESS, OR INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGES (EVEN IF THAT PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES); OR (b) UNDER ANY THEORY OF LIABILITY, AN AGGREGATE AMOUNT EXCEEDING FIFTY THOUSAND US DOLLARS (US $50,000).

(Pl. Ex. 34, TII_VARGA_00000649.) Other than the use of capital letters, which are also used in one other provision of the Agreement, a disclaimer of warranties in Section 7.4 of the Agreement (Pl. Ex. 34, TII_VARGA_00000648), the Limitation of Liability Provision is not highlighted, bolded or in any way differentiated from the other provisions of the Agreement. Again, Varga was not required to initial the Limitation of Liability Provision before signing the Agreement.

The "INDEMNITY" section, which the Limitation of Liability Provision explicitly excludes from its limitations, refers to Sections 8.1 and 8.2 of the Agreement (the "Indemnity Provisions"). In Section 8.1, Twitch agrees to indemnify Varga from any and all liability, loss, damage, claim, cause of action or other cost "arising out of or related to any third party claim alleging that the authorized use by [VARGA] of the Twitch.tv Player . . . infringes or misappropriates the Intellectual Property Rights of such third party." (Pl. Ex. 34, TII_VARGA_00000648.) Section 8.2, by contrast, requires Varga to indemnify Twitch from all liabilities, claims, causes of action losses, damages, and other costs arising out of or related to a much broader array of causes, including:

> any third party claim alleging that the Licensed Content [i.e., the content produced by Varga] and/or the Content Provider Websites and/or the Content Provider Channels [i.e., Varga's page on Twitch's website] (including content appearing within): a) infringe or misappropriate the Intellectual Property Rights

> of a third party; b) violate a third party's privacy rights or publicity rights; and /or c) are unlawful, libelous, defamatory, pornographic or obscene.

(Pl. Ex. 34, TII_VARGA_00000648.)

The "CONFIDENTIALITY" section of the Agreement, which the Limitation of Liability Provision also explicitly excludes from its limitations, refers to Sections 6.1 through 6.4 of the Agreement (the "Confidentiality Provisions"). Section 6.1 of the Agreement defines "Confidential Information" to include:

> any process, technique, algorithm, formula or method; any computer program (source and object code), design, drawing, data, research results, work in process and documentation; any engineering, marketing, servicing, financing or personnel material; and any other information or material relating to the Discloser's present or future products, services, advertisers, partners, revenues, suppliers, clients, customers, employees, investors or business; and any other information or materials that the Discloser has received from third parties and is obligated to treat as confidential or proprietary.

(Pl. Ex. 34, TII_VARGA_00000647.) Section 6.2 of the Agreement obligates the parties receiving such Confidential Information to retain the confidence of the same and refrain from disclosing Confidential Information to any third Parties. (*Ibid*.) Section 6.4 authorizes the parties to seek injunctive relief if their Confidential Information is improperly disclosed. (Pl. Ex. 34, TII_VARGA_00000648.)

In its discovery responses, Twitch has made a number of significant admissions that go to the interpretation and enforceability of the Limitation of Liability Provision. First, Twitch has admitted that a provision similar to the Limitation of Liability Provision, including the $50,000 cap on damages, was included in all of its contracts with content providers. (Pl. Ex. 21, Twitch's Response to Varga's First Set of Requests for Admission, Response No. 4.) Thus, demonstrating an individualized analysis of damages to the content provider (*e.g.,* Varga) that would flow from a breach of the content license and base network agreement was not performed or undertaken. Second, Twitch has admitted that it did not take any efforts to determine the actual losses Varga would suffer in the event Twitch breached the Agreement or whether $50,000 bore a reasonable relationship to the actual damages that would flow from a breach of the Agreement by Twitch. (*Id.*, Responses Nos. 17, 18.) Finally, Twitch has admitted that, as with all other provisions of the

Agreement, the Limitation of Liability Provision was drafted by its outside legal counsel. (Pl. Ex. 16, Twitch's Amended Response to Varga's Special Interrogatories, Set Two, Response No. 102.)

Per its terms, the Agreement was to expire two years after it was signed, in November 2014. (Pl. Ex. 34, TII_VARGA_00000642.) Unbeknownst to Varga, beginning around March 20, 2014, Howell, Babo, and Saw discussed the possibility of providing Varga more favorable terms on his contract renewal, in particular, providing him with a higher percentage of the Gross Subscription Revenue or a sponsorship payment, because of the amount of such revenue he had brought into Twitch and because of his loyalty to the company. (Pl. Ex. 46, TII_VARGA_00000446-47; Pl. Ex. 47, TII_VARGA_00000450-52.) Ultimately, however, when Babo approached Varga about renewing the Agreement, his only offer was to renew the previous terms of the Agreement. (Pl. Ex. 37, TII_VARGA_0000059.) Displaying his lack of business experience, Varga was unaware of his potential leverage and the possibility of obtaining a better deal from Twitch.

Babo approached Varga regarding renewing the contract in March or April 2014. This was an extremely busy time for Varga, as he was then taking part in a major competitive gaming event in Germany. (Pl. Ex. 2, Varga Tr., 144:4-11.) Babo approached Varga and told him something along the lines of "we need to renew your contract . . . we need to get you locked in." (Pl. Ex. 2, Varga Tr., 159:6-22.) Varga asked Babo if what was being offered was the best deal he could get and Babo said that it was. (Pl. Ex. 2, Varga Tr., 159:6-22.) Babo subsequently memorialized this conversation in an email he sent to Howell. (Pl. Ex. 37, TII_VARGA_0000059.) Based on their time together, Varga continued to trust Babo and believed Babo had his best interests at heart. (Pl. Ex. 2, Varga Tr., 134:5-9.) Varga also believed, based on his conversation with Babo, that there was a sense of urgency to signing the Amended Agreement and that the Amended Agreement was not subject to negotiation. (Pl. Ex. 2, Varga Tr., 145:2-20, 146:20-147:5.) On of around April 24, 2014, a day or two after he returned from the event in Berlin, Varga signed the Amended Agreement. (Pl. Ex. 2, Varga Tr., 161:8-15) The Amended Agreement did not alter the terms of the Agreement in any way other than to renew the term of the Agreement for two years. (Pl. Ex. 39, TII_VARGA_00000537-538.) Neither Babo

nor anyone else ever raised the possibility of Varga obtaining an attorney at this time to review the Amended Agreement and Varga did not do so before signing.

After signing the Amended Agreement, Varga's popularity continued to increase to the point that he was one of the most popular content producers broadcasting on Twitch. (Pl. Ex. 2, Varga Tr., 144:12-23.) Varga continued to produce content under the terms of the Agreements until July 2016, when his account with Twitch was indefinitely suspended by Twitch in breach of the terms of the Agreements. Over the entire course of his time at Twitch, Twitch paid Varga approximately $572,000 in revenue. (Pl. Ex. 1, Howell Tr., 99:7-9; Pl. Ex. 33, TII_VARGA_00000780). Varga also received significant amounts from sponsorships with third parties during this period.

ARGUMENT

Based on the face of the Agreements and the evidence that will be presented at trial, the Limitation of Liability Provision is unenforceable for three independent reasons: its terms are unconscionable; its application as to Varga's claims is against public policy; and it represents an unreasonable liquidated damages provision.

I. THE LIMITATION OF LIAIBLITY PROVISION IS UNENFORCEABLE BECAUSE IT IS UNCONSCIONABLE.

Initially, the Court should find the Limitation of Liability Provision to be invalid because it is unconscionable. If a court finds any clause of a contract to be unconscionable at the time it was made, the court "may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (Cal. Civ. Code. 1670.5.) There are two elements of unconscionability, "'a 'procedural' and a 'substantive' element,'" the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." (*Armendariz v. Found. Health Psychcare Servs., Inc.* (2000), 24 Cal. 4th 83 (quoting *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486-87).) Although both the procedural and substantive elements of unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a clause as unconscionable, "they need not be present in the same degree." (*Id*.)

In particular, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Id.*) Here, the terms of the Agreements themselves as well as the evidence that will be presented to the Court during the upcoming trial will demonstrate that the Limitation of Liability Provision was both procedurally and substantively unconscionable.

A. **The Limitation of Liability Provision is Procedurally Unconscionable**

Procedural unconscionability focuses on the two factors: "oppression" and "surprise." (*Stirlen v. Supercuts, Inc*. (1997) 51 Cal. App. 4th 1519, 1532.) "'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.' 'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." (*Id.* (quoting *A & M Produce Co.*, 135 Cal.App.3d at 486).) Here, the evidence will show that oppression and surprise were involved in connection with the Limitation of Liability Provision in the Agreements.

1. **The Limitation of Liability Provision is Procedurally Unconscionable Because Oppression was Present at the Times the Agreements Were Signed**.

Initially, oppression was present at the time the Agreements were signed, at the very least, with respect to their Limitation of Liability Provision. "When the weaker party is presented the clause and told to 'take it or leave it' without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present." (*Szetela v. Discover Bank* (2002) 97 Cal. App. 4th at 1100.) Here each of these elements applies to the Agreements. Initially, there can be no doubt that Varga was the weaker party at the time the Agreement was signed. In 2012, Varga was a 22-year-old college student whose only work experience involved working at Best Buy and streaming content on Own3d. The roughly $8,000 that Own3d had failed to pay him represented a significant financial issue as it threatened to prevent him from paying his tuition. By contrast, Twitch wasa sophisticated corporation backed by venture capital and supported by a large law firm as outside counsel. Further, while the Agreement represented a significant financial lifeline for Varga, Twitch had already, by 2012 entered into between 200 and 300 such

agreements and was negotiating at least five to ten with other Own3d content producers at the same time it was recruiting Varga.

The evidence will also demonstrate that the Agreements as a whole, and their Limitation of Liability Provision in particular, were presented on a "take it or leave it" basis without the opportunity for meaningful negotiation or to consult legal counsel. The terms of the Agreement, to the extent they were discussed at all, were presented to Varga by Babo and Saw in such a way that Varga understood there was not only no room to negotiate, but that there was also an urgency to agreeing to them based on what Babo and Saw described as the dire circumstances at Own3d. Varga's belief that the terms of the Agreement were not open to negotiation was furthered by his understanding, which appears to have been intentionally given, that Babo and Saw were not yet at that time employees of Twitch, but were instead themselves in a similar position to Varga and in the process of transitioning to employment with Twitch. Finally, even if Saw, Babo, or Howell were empowered to negotiate the financial elements of the Agreements, Twitch's admission that the Limitation of Liability Provision or something substantially similar is present in the signed contract of every one of its contract providers demonstrates that that provision was not open to negotiation. [1] Such circumstances demonstrate that the limitation of liability provision, if not the whole Agreement, was procedurally unconscionable. (*See A & M Produce Co.,* 135 Cal. App. 3d at 490–91 (finding "ample evidence" supporting a finding of oppression were defendant's size was "in an entirely different category" than plaintiff's and defendant's salesmen "were not authorized to negotiate any of the terms appearing on the reverse side of the preprinted contract," including the provisions at issue); *see also Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal. App. 4th 816, 824 (finding arbitration provision to be procedurally unconscionable where it was "presented as both nonnegotiable and no different than what plaintiffs would find with any other provider").)

Additionally, as the California Supreme Court has recognized, the likelihood of finding oppression with respect to pre-employment contracts such as the Agreement is higher than other

[1] As to the Amended Agreement, Babo explicitely made clear that its terms, like those of the Agreement, were not up for negotiation when he told Varga that he could not get any better terms than were being offered. (Pl. Ex. 37, TII_VARGA_0000059.)

contracts because "the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the [contract] stands between the employee and necessary employment." (*Armendariz*, 24 Cal. 4th at 115.) This pressure, and the consequent inequality of bargaining power, was significantly exacerbated in the present case because, as Twitch was well aware, Varga's employer at the time he signed the Agreement, Own3d, was facing a strong likelihood of imminent failure and Twitch was the only alternative employer in the relevant market.

Finally, oppression is further demonstrated by the gap in legal sophistication between Varga and Twitch. California courts have recognized that even "experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms." (*Stirlen*, 51 Cal. App. at 1519 (quoting *A & M Produce Co*., 135 Cal.App.3d at 489–490).) Here, at the time Varga signed the Agreement, he was a young college student whose only work experience involved working at Best Buy and streaming content on Own3d. He had no legal education whatsoever, did not consult with a lawyer before signing either of the Agreements (nor was he even given time by Twitch to consult legal counsel), and indeed, had never even hired a lawyer at the time he signed the Agreements. By contrast, Twitch was supported by a large law firm as outside counsel which drafted the entirety of the Agreement including the Limitation of Liability Provision. Courts have found oppression to exist in much less egregious circumstances. (*See Stirlen*, 51 Cal. App. 4th at 1533-34 (finding procedural unconscionability where employee was a sophisticated business executive but he lacked experience in legal matters); *Zaborowski v. MHN Gov't Servs., Inc.* (N.D. Cal. 2013) 936 F. Supp. 2d 1145, 1152, aff'd, 601 F. App'x 461 (9th Cir. 2014) (finding oppression where employment agreement was between "sophisticated business entity whose lawyers drafted the agreement" and employees who "generally do not retain attorneys to review their contracts"' although the disparity in bargaining power was "diminished" because the employees were "well-educated professionals, it is not fully dispelled").

2. **The Limitation of Liability Provision Was Procedurally Unconscionable Because it Was a Surprise**.

The Limitation of Liability Provision also constitutes a surprise because it was essentially "hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." (*Stirlen*, 51 Cal. App. 4th at 1532.) The Limitation of Liability Provision was never raised by Saw, Babo, or Howell, or otherwise discussed by the parties prior to the signing of either of the Agreements. It was buried near the back of a long, pre-printed contract, sitting on page ten of the seventeen pages of the Agreement. Such length and complexity are a significant indicator of surprise because "the length, complexity and obtuseness of most form contracts may be due at least in part to the seller's preference that the buyer will be dissuaded from reading that to which he is supposedly agreeing." (*A & M Produce Co.*, 135 Cal. App. 3d at 490–91.) Additionally, no one at Twitch urged Varga to review the Limitation of Liability Provision or any other provision of the Agreement. In fact, the Hello Sign system/program used by Twitch to send the Agreements to Varga actively discouraged Varga from doing so by transporting him immediately to the signature page, and skipping over the Limitation of Liability Provision entirely, when he pushed the "Next" button to sign the document. Again, these circumstances are remarkably similar to other cases where courts have found surprise to exist. (*See A & M Produce Co.*, 135 Cal. App. 3d at 490 (affirming trial court's finding of surprise as reasonable where the provisions at issue sat in the middle of the back page of "a long preprinted form contract," it was never suggested to plaintiff that he read that back page, and plaintiff never did read that page); *Zaborowski v. MHN Gov't Servs., Inc*. (N.D. Cal. 2013) 936 F. Supp. 2d 1145, 1152, aff'd, 601 F. App'x 461 (9th Cir. 2014) (finding surprise where arbitration clause appeared in paragraph twenty of the contracts twenty-three paragraphs, the signature line was on the following page, and the arbitration clause did not require a separate signature").) Even the fact that the Limitation of Liability Provision was differentiated slightly from the rest of the Agreement through the use of capitalization is insufficient to mitigate this surprise because, given the complexity of the Agreement, such a minor alteration would have been and was insufficient to draw Varga's attention to the Provision. (*See A & M Produce Co.*, 135 Cal. App. 3d at 490 (finding that although provision at issue was "slightly larger than most of the other contract text" plaintiff's surprise was not unreasonable

"given the complexity of the terms and [defendant's] failure to direct his attention to [the provision]").) This is particularly true because the signature page and material business terms were all contained on page three of the Agreement, well before of the Limitation of Liability Provision.

B. **The Limitation of Liability Clause is Substantively Unconscionable**.

The Limitation of Liability Provision is also substantively unconscionable. "Substantive unconscionability addresses the fairness of the term in dispute." (*Szetela*, 97 Cal. App. 4th at 1100.) "A contractual provision that is substantively unconscionable may take various forms, but may generally be described as unfairly one-sided." (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal. App. 4th 1267, 1281.) Thus, "[t]he paramount consideration in assessing [substantive] conscionability is mutuality." (*Id.* (second alteration in original).) Further, even where a provision appears to be facially neutral, the court must consider it in the context of the remainder of the contract and the parties' relationship in determining whether it is actually one-sided and procedurally unconscionable. (*See Szetela*, 97 Cal. App. 4th at 1101 (finding that prohibition on class actions was "styled" as mutual as between customers and credit card company, it was in fact one-sided because "because credit card companies typically do not sue their customers in class action lawsuits.").)

In the present case, review of the Agreement as a whole demonstrates that the terms of the Limitation of Liability Provision are unfairly one-sided. In particularly, the Agreement ensures that the Limitation of liability Clause unjustifiably slants the benefits of the provision in Twitch's favor in at least three ways: its Prohibition on the recovery of lost revenues leaves Varga with no way to recover funds owed him under the Agreements; its exclusion of confidentiality and indemnification claims ensures Twitch's interests are protected at Varga's expense; and the its definitions of Gross Revenue serve to protect Twitch's interests at Varga's expense. The ultimate result of the foregoing is that the Limitation of Liability Provision precludes Varga from almost all potential remedies while having little to no effect whatsoever on Twitch's remedies. Courts have found such one-sided provisions to be substantively unconscionable despite their seemingly neutral appearance.

1. **The Limitation of Liability Provision's Prohibition on Recovery of Lost Revenues Leaves Varga Without Any Recovery For Twitch's Breach of Contract**.

First, the Limitation of Liability Provision on its face appears to prohibit virtually any form of recovery for Varga, by prohibiting recovery of any "LOST REVENUE." (Pl. Ex. 34, TII_VARGA_00000649.) Pursuant to Exhibit B of the Agreement, with the exception of the initial $7,990.39 payment, Varga's subsequent compensation from Twitch was to come entirely in the form of revenue sharing either from Gross Subscription Revenue or Gross Advertising Revenue. (Pl. Ex. 34, TII_VARGA_00000652.) Thus, the Limitation of Liability Provision prevents Varga from recovering even sums that may be rightfully due and owing to him under the Agreements. Combined with the restrictions on every other form of damages in the Limitation of Liability Provision, Varga is left without any mode of recovery for a breaches of contract by Twitch. Even though Twitch might have, as Howell argued in his deposition, made any payments it owed Varga based on what it saw as its moral obligation, such a promise does not serve to negate the substantively unconscionable nature of the Limitation of Liability Provision. (Pl. Ex. 1, Howell Tr. 101:20-102:17; *see Stirlen*, 51 Cal. App. 4th at 1535 (finding that defendant-employer's concession that it would not seek to enforce contractual provision restricted abrogating employee's remedies did not moot employee's argument that provision was unconscionable).)

2. **The Limitation of Liability Provision's Exclusions of Confidentiality and Indemnification Claims is a One-Sided Benefit to Twitch at Varga's Expense**.

Second, the Limitation of Liability Provision's exclusion of claims brought pursuant to the Confidentiality and Indemnification Provisions amounts to a one-sided benefit for Twitch at Varga's expense. The Confidentiality Provisions obligate both sides to retain the confidentiality of the other's "proprietary or confidential information," and authorize them to obtain an injunction to prevent dissemination of the confidential information. Yet, other than, potentially, the amounts Varga earns under the Agreement, there is little or no confidential or proprietary information that Varga would share with Twitch that would make the exclusion of this provision useful to Varga. On the other hand, Varga received numerous items of confidential and possibly proprietary

information about Twitch as part of the Agreements and during the course of his engagement, including Twitch's method of compensation and internal discussions about its Terms of Service that he could take to another platform and use to recruit other streamers. Were Varga to do so, Twitch's damages could easily exceed $50,000 and would certainly include lost profits, making the exclusion of this provision from the limitation beneficial to Twitch but harmful to Varga. Based on the inherent disparity in the types of confidential information available to employees and employers, Courts have found that similar confidentiality provisions in employment agreements to be evidence of substantive unconscionable. (*Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126 ("Although facially neutral, confidentiality provisions usually favor companies over individuals.") (applying California law); *see also Chun Ping Turng v. Guaranteed Rate, Inc.* (N.D. Cal. 2019) 371 F. Supp. 3d 610, 628 (finding that provision carving out claims for equitable relieve to enforce confidentiality provisions were "likely to benefit employers . . . more than employees").)

Similarly, Twitch is far more likely to benefit from the Limitation of Liability Provision's exclusion of claims brought pursuant to the Agreement's Indemnity Provisions than is Varga. Indeed, the Indemnity Provisions themselves are facially unbalanced. Section 8.1 of the Agreement requires Twitch to indemnify Varga only for third party claims alleging that "the authorized use by Content Provider of the Twitch.tv Player … infringes or misappropriates the Intellectual Property Rights of such third party." Section 8.3, by contrast, requires Varga to indemnify Twitch for all claims alleging that content on Varga's content and/or websites and/or "Channels (including content appearing within)": "a) infringe or misappropriate the Intellectual Property Rights of a third party; b) violate a third party's privacy rights or publicity rights; and/or c) are unlawful, libelous, defamatory, pornographic or obscene." Section 8.1, on its face does not provide Varga anything that he is not already legally entitled to, that Varga would be legally liable for, or that Twitch would not be the target of. If Twitch provided Varga with the software required to stream on his Twitch.tv channel, and Varga's use of the Twitch.tv Player was within the course of his content streaming on the Twitch.tv channel, then it is highly unlikely that Varga would be the target of a claim for violation of intellectual property rights of another simply through its use.

On the other hand, it is quite likely that Twitch would make use of Section 8.3 in which Varga indemnifies it for alleged violations of intellectual property rights, privacy or publicity rights, or other "unlawful, libelous, defamatory, pornographic or obscene" content that he provides through his Twitch channel. In essence, this provision states that Varga must indemnify Twitch for any loss or damage arising from such allegations—even if Twitch continued to profit from that content.

3. **The Agreement's Definitions of the Revenues to be Paid to Varga Also Serve to Protect Twitch's Interests at Varga's Expense**.

Finally, beyond the exclusion of claims based on violations of the Confidentiality and Indemnity Provision from the Limitation of Liability Provision, Twitch's interests are also protected by Sections 1.1.1 and 1.3.1 of the Agreement, in that claims for recovery of revenues paid to Varga that are later ascertained to be fraudulent are exempted from the Limitation of Liability Provision. This is because Sections 1.1.1. and 1.3.1 define "Gross Advertising Revenues" and "Gross Subscription Revenues," respectively, to exclude "any chargebacks or fraudulent transactions which require a refund of revenues previously received." Varga's advertising revenue share is based on Gross Advertising Revenues, and his subscription revenue share is based on Gross Subscription Revenue. Accordingly, Twitch's recovery of sums paid to Varga as a result of fraudulent transactions is built into the very definition and formula for Varga's compensation. If it is determined that Varga was compensated as a result of fraudulent transactions, rather than attempting to recover those sums from Varga (and subjecting itself to the Limitation of Liaiblity provision), Twitch could simply set off these amounts from subsequent payments owed to Varga.

4. **Courts Have Found Provisions Providing for Similar One-Sided Restrictions on Remedies to be Substantively Unconscionable.**

The overall effect of these three provisions is, therefore, entirely one-sided in Twitch's favor. By excluding from the Limitation of Liability Provision any claims based on Varga's breach of the Confidentiality Provision, the Indemnity Provision (which would allow Twitch to continue to benefit from Varga's unlawful stream even while Varga is burdened with repaying Twitch's ill-gotten gains), and the recovery of revenue paid to Varga for fraudulent transactions,

Twitch's remedies are not only in large part unaffected by the Limitation of Liability Provision, but are, in fact, strengthened by it. On the other hand, Varga has little if nothing to gain from the exclusion of claims based on breaches of confidentiality or indemnity, and is at Twitch's mercy if Twitch sets off allegedly fraudulent transactions. Indeed, Varga would be obliged to sue Twitch for breach of contract in order to recover improperly withheld sums thereby subjecting himself to the limits of the Limitation on Liability Provision, while Twitch would be entitled to self-help.

Courts have held similar one-sided limitations on remedies to be unconscionable. In *Lhokta v. Geographic Expeditions, Inc*. (2010) 181 Cal. App.4th 816, 825-26, the Court of Appeal set aside a consumer arbitration agreement drafted by a travel company that, among other things, limited the maximum amount of the plaintiff's recovery to the cost of the travel itself and required plaintiffs to indemnify the travel company for any expenses related to defending claims covered by the agreement. In determining that the contract was substantively unconscionable, the Court noted that by limiting recovery to the cost of travel, the agreement guaranteed that the plaintiff would not obtain anything approaching full recompense for the harm. (*Id.* at 825.) Thus, just as in the present case, the result of the one-sided remedy provisions was that the weaker party, here Varga, was allocated all of the risk.

Similarly, in *Szetela v. Discover Bank*, 97 Cal. App.4th 1094, the Court of Appeal found an arbitration clause that prohibited both parties from bringing class claims to be unconscionable. In finding that the provision was one-sided enough to make it substantively unconscionable, the court noted that although the no-class action provision was a mutual prohibition on its face, "it [was] difficult to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits." (*Id.* at 1101.) Further, the Court noted that the provision was a disincentive for Discover to avoid wrongful conduct that would lead to class litigation. (*Ibid.*) In the instant contract, there is little or no disincentive for Twitch to refrain from wrongful conduct, because Varga's recovery is limited, yet Twitch is protected even if it continues to benefit from its conduct beyond the damages limitation amount.

Finally, in *A & M Produce Co. v. FMC Corp*., 135 Cal. App. 3d 473, a case involving the sale of farm equipment, the Court of Appeal found that a limitation of liability provision, which, like the one in the present case, prohibited consequential damages, was substantively unconscionable and thus unenforceable. Although the provision was facially neutral, the court found that this provision protected only the seller, as it resulted in the seller "in essence guarantying nothing about what the product would do. Since a product's performance forms the fundamental basis for a sales contract, it is patently unreasonable to assume that a buyer would purchase a standardized mass-produced product from an industry seller without any enforceable performance standards." (*Id.* at 491.) Similarly, it is patently unreasonable to assume that any employee would have agreed to an employment contract that, as the Agreement did, waived his right to recover any revenues that he was owed by his or her employer. Just as the Court of Appeal did in each of these cases, the Court, should therefore, find the Limitation of Liability Provision to be substantively unconscionable and therefore unenforceable.

II. THE LIMITATION OF LIABILITY PROVISION IS UNENFORCEABLE BECAUSE IT IS AGAINST PUBLIC POLICY.

The Limitation of Liability Clause is also unenforceable for the independent reason that it's application would be against public policy. Under Section 1668 of the California Civil Code, "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." (Cal. Civ. Code § 1668.) "[T]here can be no exemption from liability for intentional wrong, gross negligence, or *violation of law*." (*Health Net of California, Inc. v. Dep't of Health Servs*. (2003) 113 Cal. App. 4th 224, 234 (quoting (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 631, p. 569) (emphasis in original).) Accordingly, any limitation of liability clause that seeks to preclude or limit claims based on intentional wrongs or violation of law "cannot serve to bar the recovery of damages and is unenforceable." (*Id.* at 235.)

Here, because the Limitation of Liability Provision makes no exceptions for intentional wrongs or violations of law, but instead bars the recovery of consequential damages under any

cause of action and limits the total recovery "UNDER ANY THEORY OF LIABILITY" to $50,000, it is against public policy. (Pl. Ex. 34, TII_VARGA-00000649.) Given that this language was drafted by Twitch, with the assistance of its outside counsel and as part of a contract of adhesion, any ambiguity in the language should be construed against Twitch. (Civ. Code § 1654; *See Maxim Crane Works, LP v. Tilbury Constructors* (2012) 208 Cal. App. 4th 286, 294 (printed contract with choice of law provision unfavorable to drafter was construed against drafter who "was in the best position to avoid this result"); *Mayhew v. Benninghoff* (1997) 53 Cal. App. 4th 1365.) (this doctrine is applied with special force when the person who drafted the agreement is a lawyer.) The Limitation of Liability Provision should, therefore, be understood to bar even claims for intentional wrongdoing or violations of law. As such, the Limitation of Liability Provision is against public policy and should be held unenforceable by this Court.

Moreover, even if the Court does not find the Limitation of Liability Provision to be unenforceable on its face, the provision is still unenforceable with respect to each of the causes of action alleged in Varga's Complaint. Varga's Complaint sets forth five causes of action: breach of contract, breach of the implied covenant of good faith and fair dealing; intentional misrepresentation; negligent misrepresentation; and violation of Section 17200, et seq. of the Business and Professions Code. Each of these causes of action involves allegations of intentional wrongs and/or violations of law, rendering the Limitation of Liability provision unenforceable.

With respect to Varga's causes of action for intentional and negligent misrepresentation, the Limitation of Liability Provision is clearly unenforceable. "The cases uniformly hold that 'limitation of liability clauses are ineffective with respect to claims for fraud and misrepresentation,' regardless of whether the public interest is implicated." (*Peregrine Pharmaceuticals, Inc. v. Clinical Supplies Management, Inc.*, 2014 WL 3791567 , *15 (C.D. Cal. 2014) (quoting *Food Safety Net Servs. V. Eco Safe Sys USA, Inc.* (2012) 209 Cal.App.4th 1118, 1126).) The Limitation of Liability Provision is, therefore, inapplicable with respect to these claims and cannot serve to limit Varga's recovery based on them. (*See id.* (holding limitation of damages clause inapplicable to negligent misrepresentation and fraud claims).)

Similarly, the Limitation of Liability Provision is clearly unenforceable as to Varga's causes of action for the violation of Section 17200. Again, "the plain language of section 1668 invalidates contract clauses seeking to relieve a party from responsibility for future statutory and regulatory violations, regardless of whether the public interest is affected." (*Capri v. L.A. Fitness Int'l, LLC* (2006) 136 Cal. App. 4th 1078, 1084.) The Limitation of Liability Provision cannot, therefore, serve to limit Varga's recovery based on this cause of action. (*See id.* at 1087 (holding that exculpatory clause unenforceable with respect to plaintiff's claim for violation of statutory duty); *Health Net of California, Inc. v. Dep't of Health Servs.* (2003) 113 Cal. App. 4th 224, 235 (same).)

Finally, the Limitation of Liability provision is unenforceable with respect Varga's breach of contract and duty of good faith and fair dealing claims because Varga's damages resulted from intentional wrongdoing by Twitch. "[T]he plain language of § 1668 . . does not expressly limit the rule to tort claims." (*Civic Ctr. Drive Apartments Ltd. P'ship v. Sw. Bell Video Servs.* (N.D. Cal. 2003) 295 F. Supp. 2d 1091, 1106.) Thus, the court in *Civic Center* held that the limitation of liability clause, as in the present case, purported to bar the recovery of all consequential damages was unenforceable with respect to the plaintiff's breach of contract and duty of good faith and fair dealing claims because the plaintiffs had presented evidence as part of these claims that "could lead to the conclusion that their consequential damages resulted from [defendant's] fraudulent concealment of the installment of faulty cable" at issue in the breach of contract claim. (*Id.*) Similarly, here, Varga has alleged that it was harmed by Twitch's misrepresentations regarding content he could permissibly stream on Twitch, misrepresentations that were ultimately used by Twitch to justify his termination in breach of the Agreements and in contradiction to the implied covenant of good faith and fair dealing. (*See, e.g.*, Compl. ¶¶ 51-52, 65-66.) That Varga has plead certain causes of action in contract rather than tort does not permit Twitch to evade Section 1668's prohibition on the exculpatory clauses involving intentional conduct.

III. THE LIMITATION OF LIAIBLITY PROVISION IS UNENFORCEABLE BECAUSE IT IS AN UNREASONABLE LIQUIDATED DAMAGES PROVISION.

Finally, the $50,000 cap on damages arising "UNDER ANY THEORY OF LIABILITY" included in the Limitation of Liability Provision is unenforceable because it constitutes an unreasonable liquidated damages provision. (Pl. Ex. 34, TII_VARGA_00000649.) Initially, although styled as limitation of liability provision, the $50,000 cap also constitutes a liquidated damages provision. Under California Law, liquidated damages are defined as "an amount of compensation to be paid in the event of a breach of contract, the sum of which is fixed and certain by agreement." (*Chodos v. West Publg. Co*. (9th Cir. 2002) 292 F.3d 992, 1002 (quoting *Kelly v. McDonald* (1929) 98 Cal. App. 121, 125).) "Thus, to constitute liquidated damages, the contractual provision must: (1) arise from a breach, and (2) provide a fixed and certain sum." (*Ruwe v. Cellco P'ship* (N.D. Cal. 2009) 613 F. Supp. 2d 1191, 1196.) Because they do both of these things, courts have, therefore, found limitation of liability provisions, that, like the $50,000 cap included in the Limitation of Liability Provision, set specific dollar caps on breach of contract damages to be liquidated damages provisions. (*See H. S. Perlin Co. v. Morse Signal Devices* (1989) 209 Cal. App. 3d 1289, 1292 (examining provision limiting liability "to the aggregate of six (6) monthly payments, or to the sum of Two Hundred Fifty ($250.00) Dollars, whichever sum shall be less" as a liquidated damages provision)*; Apex Compounding Pharmacy, LLC v. eFax Corp.*, No. LACV1605165JAKJPRX, 2018 WL 2589096, at *10 (C.D. Cal. Apr. 26, 2018) (finding that limitation of liability provision stating that defendant "shall 'in no event ... be liable for any direct, incidental special or consequential damages' and that [defendant's] liability to customers 'is limited to $50'" amounted to a liquidated damages provision).)

Pursuant to Section 1671 of the California Civil Code, a provision setting liquidated damages in the event of a breach of contract is invalid and unenforceable if "the provision was unreasonable under the circumstances existing at the time the contract was made." (Cal. Civ. Code § 1671.) "A liquidated damages clause will generally be considered unreasonable, and hence unenforceable under section 1671(b), if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach." (*Ridgley v. Topa Thrift & Loan Ass'n* (1998) 17 Cal. 4th 970, 977.) "The amount set as liquidated damages

'must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained.'" (*Ibid.*) Other relevant considerations in the determination of whether a liquidated damages provision is unreasonable include: "whether the parties were represented by lawyers at the time the contract was made, the anticipation of the parties that proof of actual damages would be costly or inconvenient, the difficulty of proving causation and foreseeability, and whether the liquidated damages provision is included in a form contract." (*Weber, Lipshie & Co. v. Christian* (1997) 52 Cal. App. 4th 645, 654–55) Here, all of these factors favor a finding that the $50,000 cap is unreasonable.

First, it is undisputed that the parties did not make a reasonable endeavor to estimate whether the $50,000 cap amounted to "a fair average compensation for any loss that may be sustained" by Varga. (*Ridgley*, 17 Cal. 4th at 977.) Twitch has admitted that it did not take any efforts to determine the actual losses Varga would suffer in the event Twitch breached the Agreement or whether $50,000 bore a reasonable relationship to the actual damages that would flow from a breach of the Agreement by Twitch. (Pl. Ex. 21, Twitch's Response to Varga's First Set of Requests for Admission, Response Nos. 17, 18.) This is unsurprising given that, as Twitch has also admitted, it uses the same Limitation of Liability Provision, with the same $50,000 damages cap, in every agreement it signs with its content providers. (Pl. Ex. 21, Twitch's Response to Varga's First Set of Requests for Admission, Response to Request No. 4.) Further, it is undisputed that Twitch and Varga never discussed whether the $50,000 cap in the Limitation of Liability Provision accurately estimated Varga's losses in the event of a breach by Twitch; indeed, they never even discussed the Limitation of Liability Provision at all. For this reason alone, the Court should find that the $50,000 cap constitutes an unreasonable and unenforceable liquidated damages provision. (*See Applied Elastomerics, Inc. v. Z-Man Fishing Prod., Inc.* (N.D. Cal. 2007) 521 F. Supp. 2d 1031, 1046 (holding liquidated damages provision was unreasonable because it "does not represent the result of a reasonable endeavor by the parties to estimate a fair compensation for any loss that may be sustained [and] it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a royalty underpayment due to fraud or false statements").)

Additionally, each of the other factors to be considered in determining the validity of a liquidated damages provision demonstrates that the $50,000 cap is unreasonable as applied to Varga. Varga was not represented by counsel at the time either of the Agreements were signed while Twitch was represented by a large law firm as outside counsel. Proof of Varga's actual damages would be neither costly or inconvenient, but could be determined based on the amounts of revenue and sponsorships he was earning prior to being wrongfully suspended by Twitch in breach of the Agreements. Nor will causation be difficult to prove, as it is obvious that Varga suffered a significant financial decline immediately after his account was indefinitely suspended by Twitch. And, finally, the liquidated damages provision was included in a generic form contract prepared by Twitch's outside counsel the Agreements. Therefore, to the extent any doubt exists as to whether Twitch's failure to take any efforts to determine whether $50,000 cap constitutes an unreasonable liquidated damages provision, these doubts should be resolved in Varga's favor.

CONCLUSION

For the reasons set forth above, the evidence presented at trial will demonstrate that the Limitation of Liability Provision is unconscionable, against public policy, and an unreasonable liquidated damages provision. The Court should, therefore, hold the Limitation of Liability Provision to be invalid and unenforceable against Varga.

DATED: July 30, 2019

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CERTIFICATE OF SERVICE

I, Nicole Griesbach, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 2415 E. Camelback Road, Suite 700, Phoenix, Arizona 85016.

On July 30, 2019, I served the following document(s) on the parties in the within action:

PLAINTIFF'S OPENING TRIAL BRIEF FOR BIFURCATED TRIAL

X	**VIA FILE & SERVE:** By causing a true and correct copy thereof to be served through File & ServeXpress addressed to all parties appearing on the File & ServeXpress Serve electronic service list.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on July 30, 2019.

Nicole Griesbach